THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. } ST. LOUIS, FRIDAY, OCTOBER 23, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.
S. D. THOMPSON, Ass't Editor. }

THE SELECTION OF JURIES.—We take pleasure in publishing in this number an interesting letter from Hon. Robert A. Hill, United States District Judge for the Districts of Mississippi, detailing a plan adopted by Mr. Circuit Judge Woods and himself, for the selection of intelligent and properly qualified jurors in the federal courts of that state. Where jurors are selected in a manner so fair and judicious, the administration of justice cannot fail to command the confidence of the people and to conduce to the repose of society. As the subject, so far as the federal courts are concerned, is likely to come before the coming session of Congress, we should be glad to hear from other judges, and also from members of the bar on this important question.

THE AMENDE HONORABLE.—We take pleasure in giving the following a prominent place in our columns. If General Case had been more prompt in exposing the rascality of Kellogg, in drawing a salary as colonel of an Illinois regiment and chief justice of Nebraska Territory at the same time, and if his *expose* of the matter had not been burdened with so many circumstantial explanations, we should not have been drawn into the error of doing him the injustice we did. Governor Kellogg owes it to himself to deny General Case's statements, if he can—unless he thinks a denial would injure his popularity with his party in Louisiana.

WINCHESTER, ILL., October 17, 1874.

EDITORS CENTRAL LAW JOURNAL:—By the last item, under the head of "Legal News and Notes," in your invaluable paper of yesterday, you have done injustice to General Henry Case. He has, for nearly twenty years, been a member of the Winchester (Ill.) bar, and is a gentleman, whose "reputation for truth and veracity," has never been questioned "in the neighborhood where he resides." His article in relation to Wm. Pitt Kellogg, was first published in one of the papers of this place; it has been read and talked about by many persons here—by those who have known General Case longest and best, and I do not believe there is a single person here who doubts the substantial truthfulness of his statements. Very truly, JAS. W. RIGGS.

FEDERAL COURT REPORTS.—We learn that Mr. Circuit Judge Woods, whose circuit embraces the Gulf States, has in press a volume of circuit court decisions, which is expected to be ready in January next. We also learn that Hon. Robert A. Hill, judge of the federal district courts for the two districts into which the State of Mississippi is divided, has consented to prepare for publication a volume of his decisions, provided a sufficient number of subscribers can be obtained to justify the expense. These decisions comprise cases both in the district and circuit court, most of which are final. We hope a sufficient uumber of the members of the bar in Mississippi will subscribe to this undertaking to warrant its prosecution. A volume of cases selected from the great number of written judgments which Judge Hill has rendered, will be of great use to practitioners in the federal courts in Mississippi, and of undoubted value to the bar elsewhere. We also learn that the promised volume of federal district court reports in preparation by Hon. H. B. Johnson of Jefferson City, is being postponed to enable the editor to get together a better selection of cases. These will be culled from all the district courts in the eighth circuit.

A New Solution of the Railroad Question.

The Western Jurist, for September, has an able article on Monopolies, in which it confines itself to what it considers the two great monopolies of the country, the railroads and the national banks. After showing conclusively that railroads, under the present system, are monopolies, and from the nature of the case cannot be otherwise, and after pointing out the insuperable difficulties in the way of regulating railway tariffs by legislative interference, state or federal, the able editor suggests a remedy in the following language. It is worth the attention of the country:

But is there any remedy for the evils of our railroad monopolies? We think there is, and to our mind it seems very practical, although we confess that experience may demonstrate it to be pregnant with difficulties and possible failure. It is the exercise of the power of eminent domain, *upon*, as it is exercised *in favor of* railroad companies. That is, railroad companies are allowed to call into exercise the power of eminent domain to take from the owners of real estate the right of way for their railroads—this right of way is the right to use the real estate for the purpose of laying the track and running their trains over it for a series of years or perpetually. After the track is laid, the whole, that is the land or right of way, the ties, rails, spikes, etc., become real estate, and itself subject to the power of eminent domain. Now let any person who desires to run an engine or a car or a train of cars, call into exercise this power of eminent domain against or upon the railroad company, and by the assessment of a jury, subject to revision by the courts, condemn the *right of way* over the railroad for his engine, car or train—the assessment would fix the rate per mile, for an engine, a passenger car, a loaded car, an empty car, and perhaps grade the price for an engine according to its weight. This condemnation or assessment might be in the nature of a general or public proceeding, so that when once fixed at the instance of any one, it should be equally open and available to all who should choose to run an engine, car or train on the railroad track,—upon the payment in advance for such right of way. The payment could be made at the station where the train starts to the next station, or to the remotest station it will reach. Under this regulation any individual or company owning an engine could haul the cars of any merchant or freighter at such price as they might agree, and the multiplication of such individuals and companies would afford competition and thereby destroy the monopoly. These individuals and companies might also own their cars and become carriers of freight as well as haulers of cars, and thereby accommodate the general public, as do the railroad companies now. In other words, this plan would open the railroads as the highways, to everybody, and they would become the avenues whereon competition in the carrying business would be as sure to exist as in any other business open to all, and thereby the monopoly would be destroyed, and reasonable and low charges for carrying freight will certainly follow.

We would not exclude the railroad company owning the track from the right to operate their own engines, cars and trains; but they should do so upon terms of *exact equality* with all others. The assessment of damages for the right of way for an engine, car or train, would in effect, be a toll to be paid for each mile any engine, passenger car, loaded car or empty car should be run upon the track, and for every day it should be still and occupy the side track. The probable ultimate effect of this plan would be that the railroad companies would case to operate their railroads themselves and rely upon the tolls for their revenues; leaving the carrying business wholly to individuals and to individual enterprise, and this would doubtless result in the earlier delivery of freights, the increase of care and the reduction of accidents; and in all probability the companies owning railroads would find a larger margin of profits from the tolls, than they now find from the freights, and the plan would become popular with the owners of the stock, if it did not with officers of the companies and managers of the railroads.

But, it will be said, that these railroads, under such a plan, will become, by the multiplication of accidents coming from the indiscriminate use of the track by everybody, the very grave-yards of the whole people. Will this be so? To our mind the answer is, upon principle, a direct negative. In the first place it will be remembered, that even now (except those run in exact conformity with the time table), all trains are run by telegraph—that is, no train leaves one depot or station for another until the conductor is notified by telegraph that

the track is clear and he must run on such time to the next station. Under the plan proposed, trains could be run in the same way. The accidents would be reduced, instead of increased, because of the increase of care which would come naturally from the fact that the operators of the trains under the plan proposed would often be personally interested in the earnings of the train itself, and would always have an individual responsibility beyond that which they feel while in the employment of the large corporations under the present plan. But further than this, the plan proposed would soon result in the construction of double tracks upon all roads where the business is sufficient to render the doing of it difficult or dangerous upon a single track. To stimulate the early construction of a double track a higher rate of toll or assessment might be allowed upon a double track than upon a single one.

We have for some time thought that the plan embodied in the above extract (which we have seen broached elsewhere) offers the only possible way out of the difficulty. It would simply result in placing railroad transportation on the same footing as that by ocean and river, *open to all*, on payment of the lawful tolls to the owner, and subject only to the right of the government to adopt and enforce such regulations as shall be found necessary to prevent collisions, and preserve life and property. We say the right of government; for manifestly the principal practical difficulty in the way of this plan is, that the running of numerous trains owned by private individuals on a single (or even a double) railroad track, might result in frequent collisions; and this could only be prevented, and justice done between so many competitors, by government supervision. A parallel case of government supervision may be instanced in the regulations enacted by Congress concerning pilotage, and for preventing collisions at sea. This supervision should be conducted through the instrumentality of sworn and bonded officials, skillful in railway management, and who should be both civilly and criminally liable for misfeasance and negligence. Severe penalties should be imposed on them to prevent extortion, bribe-taking, or the giving of preference to one competing train-owner over another; and speedy and summary remedies should be given against them. With such a system in practical operation, it would be as impossible to see a monopoly in a great railroad, as it is now to see it in the Atlantic ocean or the Mississippi river.

The Louisiana Question.

We hope our readers will pardon us for again alluding to this question; but it is one which, in our judgment, the American bar cannot put aside for mere money-getting, without violating a high and patriotic duty. In our last issue we took occasion to dissent from the view taken by Hon. Reverdy Johnson, who holds that the President's recognition of the Kellogg government is irrevocable and binding upon himself, as well as upon all other persons. We have since been fortified in the view there taken, by a very clear and convincing letter of Mr. Charles O'Conor, in the New York Herald, for September 30. We recommend a perusal of this letter to every person who desires to read a clear argument upon the law of this vitally important question.

Mr. O'Conor proceeds to ask the question: "Was the original error of the President in recognizing Kellogg as governor a conclusive judgment which, subject only to a review by Congress, was absolutely binding upon the persons, including the President himself, and also irrevocable by him even, though he should have subsequently discovered his mistake? This question Mr. O'Conor answers emphatically in the negative. In the course of his letter, he says:

When one of these [meaning state governments or pretended state governments] appeals to the federal government for protection against the "domestic violence" of the other, Congress, or in its default the President, must of course determine the question, and the state government recognized by his determination, must be protected accordingly against its rival by the federal executive. Be it in reason, justice and truth ever so erroneous, such a decision must, nevertheless, be regarded valid so long as it remains in force. And it is binding on all persons and in all courts and places. Against the moral or political wrong, if there be one, there is no remedy but revolution, and with revolutions juridical science has little or no concern.

All this I think must be conceded by every sound lawyer, and from these premises some persons who believe that Kellogg was not duly elected, still maintain that the President's original error in recognizing him is of such potency, in law or policy, that the President is bound to persist in it and to reinstate Kellogg by the military forces of the union as often as he may be displaced. In my opinion the premises do not warrant the conclusion thus drawn from them.

A decision by competent official authority binds, it is true, without reference to the question of its justice or propriety; but this rule obtains only so long as the decision remains in force; and the cases are rare indeed, if there be any, in which a decision, by any tribunal or official authority, is absolutely irreversible. Courts of the highest authority, or, as it is sometimes expressed, courts of the last resort, occasionally recall their own judgments and hold for naught their own previous solemn adjudications. This was lately done by the Supreme Court of the United States, in the familiar controversy concerning the constitutionality of the legal tender acts. It is true that a court of last resort will generally refuse to reconsider a question which it has once directly adjudicated. But no proposition is better established than that it is the duty of every court to recall any decision of its own which is has become convinced was erroneous.

In this Louisiana case the paramount authority was Congress. A recognition of the Kellogg government by that body, would have bound the President and all others until Congress should itself have again acted on the subject and revoked its former conclusion. Congress not having acted in this case, President Grant's recognition had a similar effect, and bound all parties; but as Congress might have revoked its determination, so might President Grant have reconsidered his opinion, and when called upon a second time by Kellogg, he might have refused his aid. And unless, when such second application was made, General Grant still labored under his original and erroneous opinion that Kellogg was duly elected, he ought to have so refused.

To this letter Mr. Johnson publishes in the New York Herald, for October 5, a reply in which he adheres to his first position; and to this Mr. O'Conor again replies in the same journal, for October 8. Mr. Johnson, in his reply to Mr. O'Conor, supports his first view by the following forcible reasoning:

If the President, under the constitution, is bound, in such an exigency as is supposed, to determine who is the legitimate governor of a state, it seems to me to follow that when he does so decide his decision should be final. If not final, he is at liberty to change it afterwards, as often as he may deem proper. How, then, would stand the acts of the government originally recognized in the interval between such recognition and the President's subsequent change of opinion? Are such acts to be deemed nullities? Can the people of a state who may have been aggrieved by the course of the governor, call him to account for any injury they may have sustained, upon the ground that the President's subsequent recognition of some one else conclusively determines that he was not the legitimate governor?

And these suggestions are equally applicable to the President's recognition of the legislature of a state when a call is made upon him under the constitution by that department. He changes his opinion afterwards, on becoming convinced that the body was not legitimate, and recognizes some other body as the legislature. If he has a right to do this one week or one month after his first decision, he has the right to do it after any lapse of time. Are all the laws passed by the legislature in the interval between his first decision and his subsequent reversal of it to be declared void? Are the rights which have grown out of such legislation to be annulled? Are all the debts contracted by the legislature or under its authority to be repudiated? I think all will admit that this cannot be sound doctrine. And if it is not, I see no reason for imputing error to it, except by supposing that the first decision of the President, on a call of a governor or a legislature, is as conclusive upon him as Mr. O'Conor admits it to be upon everyone else. Should the President, who recognizes a governor, cease to be President, could his successor, when called upon to suppress violence, refuse to recognize the same officer and determine that some other person was governor? Suppose the President refuses to recognize the person first making the call, and subsequently recognizes another as governor, can he

alter his last decision and reinstate the first man in office? It is, in my opinion, obvious that such changes were never contemplated by the constitution.

This reasoning Mr. O'Conor combats in the following language, in which he scarcely treats his opponent with that deference which becomes the age and distinguished abilities of both:

The other set of imagined evils is, indeed, a pretty formidable raw head and bloody bones, and well calculated to affright the lovers of peace and order. It is suggested that everything done under the rule of a usurper would be set aside by his expulsion, and "confusion worse confounded" would ensue. The terrible nature of such consequences are not to be desired. But the law repudiates the assumed premises. No such consequences would follow a change of opinion by the President, and his consequent refusal to recognize a displaced usurper, whom in the honest and conscientious exercise of his constitutional power, but under mistaken impressions as to the facts or the law, he had seated in the chair of state a year or two previously. When recognized by the President, and thenceforth as long as he held in his possession the insignia of office and exercised the duties of state executive, the usurper would be governor *de facto*. All his acts as such, would be perfectly valid and binding as it respects all persons except himself. If he were displaced in any manner, legal or illegal, his official acts while in possession would still remain valid to all intents and purposes, notwithstanding his removal and notwithstanding any express or implied sanction of such removal by the President. The acts of a usurping *interim* legislature would be subject to the same rule. So far, indeed, as they were not carried into execution by the actual vesting of rights under them, they might, and doubtless would, cease to operate from the moment of the change which should bring into power the rightful authorities. Thus it will be seen that the general unwritten common law has provided a means of preserving the interests of individuals and of the commonwealth from the immaginary confusion and disorder which might be supposed to result from the overthrow of an intrusive government. This doctrine is as familiar as it is necessary. The "Law Student's Primer" mentions a striking illustration of it. "Treasons committed against Henry VI. (of Lancaster) were punished under Edward IV. (of York), though all the line of Lancaster had previously been declared uusurpers by act of Parliament." 4 Blackstone's Commentaries, p. 77. This conservative principle is deeply seated in the common law, and occasions for its application are constantly arising. Let a single and familiar instance suffice:—a usurper once held the register's office in this city for a long period. He held it and exercised its functions until ousted by a judgment of the court of appeals. He remained in the office a considerable time after the supreme court had decided against him. He was adjudged to be a usurper from the beginning, without any title to the office. People v. Coutant, 11 Wendell's R., 132 and 511. Many titles to valuable property may, and doubtless do, depend on the validity of this man's acts. Mr. Johnson would find no difficulty in sustaining them. It is true that in such cases the usurper cannot plead his unrighteous possession of the office in bar of a prosecution against himself for injuries resulting from his unjust acts; nor could he recover the salary allowed for lawfully exercising the office. In these consequences there is not any great mischief. I submit that the arguments *ab inconvenienti* fail utterly, and Mr. Johnson has advanced no others.

Mr. Johnson alludes to Mr. O'Conor's reference to the right of courts to change their opinions, and asserts that "it is not true that a court which has pronounced a judgment has a right to reverse it and pronounce another when the time has passed within which a review may be had." To this, Mr. O'Conor replies:

It is quite true that on a claim by A. B. against C. D., a judgment actually recovered, if unappealable or not appealable from in season, settles the right to the particular sum or thing in controversy between these two private persons, so that the defeated defendant cannot, in general, recover it back in another action. Even this is only the general rule. It is not without exceptions, for if fraud and falsehood be practised in obtaining an unjust judgment, there is a remedy. Byers v. Surget, 19 Howard's U. S. R., 308; Bowen v. Evans, 2 House of Lords Cases, 281; Michigan v. Phœnix Bank, 33 N. Y. Reports, p. 30. But the general rule of the judicial department, which I thus admit, has not the remotest application to the proceedings before General Grant on the rival claims of McEnery and Kellogg to the governorship.

Both Mr. Johnson and Mr. O'Conor seem to agree that the analogies drawn from judicial decisions should be applied with extreme caution. Thus, Mr. Johnson, referring to this precise point, says: "An analogical reasoning as often tends to erroneous as to correct conclusions. The facts are very seldom precisely the same, and when they are not, the legal results are seldom the same." And Mr. O'Conor asserts that "there is extremely little resemblance between judicial decisions and executive resolutions." Nevertheless, Mr. Johnson proceeds to enquire how the matter stands upon authority, and cites in support of his position, Knox County v. Aspinwall, 21 How. 539, and Virginia v. West Virginia, 11 Wall. 39. We confess that the first of these cases does not direct our minds to the conclusion reached by Mr. Johnson. The case of Knox County v. Aspinwall, and many other decisions which have followed it, simply hold that when the legislature of a state has authorized a county or other municipal corporation to issue its bonds in aid of a railroad or other public enterprise, in case the people of the municipality shall, upon an election held for that purpose, authorize such bonds to be issued, and such bonds are issued and pass into the hands of *bona fide* holders, a court of justice will not, in a suit upon such bonds by innocent holders, go behind the certificate of the county commissioners, or other executive board of the municipality, and investigate whether such election was held on the proper notice, or otherwise, in accordance with law. These cases rest on the undisputed principle to which we called attention in our first article on the Louisiana question (*ante*, pp. 475, 476), that when the tribunal, officer or board of officers which has jurisdiction *finally* to declare the result of an election, or to act in pursuance thereof, exercises such jurisdiction, all other persons, officers and tribunals, are bound by the determination so made; and no *other* officers, or tribunal can re-examine such decision in a collateral proceeding, especially in a case which involves the rights of innocent third parties, which have been acquired upon the faith of it. But these decisions, as we understand them, do not touch the power of the municipal board to reconsider its own decision before innocent persons have acquired rights on the faith of it, or otherwise, so as not to divest rights already vested.

The case of Virginia v. West Virginia, does, we confess, support Mr. Johnson's position by a remote analogy. The legislature of Virginia passed an act authorizing the counties of Berkeley and Jefferson to determine by a vote of the people whether they would remain in Virginia or be annexed to West Virginia. The returns of the elections were to be certified *to the governor* of Virginia, who, on being satisfied that the elections were fair and in all respects legal, was to certify the result to West Virginia. He did so, and advised West Virginia that the two counties had decided to become parts of that state. Afterwards, Virginia filed a bill in the Supreme Court of the United States to recover possession of this territory, alleging that the elections were fraudulently conducted, and that the governor decided as he did because he was deceived as to that fact. The supreme court dismissed the bill on the ground that the governor's decision was conclusive of the vote. The grounds on which this decision rests are to be found in the following vigorous language of Mr. Justice Miller, who delivered the opinion of the court:

We are of opinion that the action of the governor is conclusive of the vote as between the states of Virginia and West Virginia. He was in legal effect the state of Virginia in this matter. In addition to his position as executive head of the state, the legislature delegated to him all its own power in the premises. It vested him with large control as to the time of taking the vote, and it made his *opinion* of the result the condition of action final. It

rested, of its own accord, the whole on his judgment, and in his hands. In a matter where that action was to be the foundation on which another sovereign state was to act—a matter which involved the delicate question of permanent boundary between the states and jurisdiction over a large population—a matter in which she took into her own hands the ascertainment of the fact on which these important propositions were by contract made to depend, she must be bound in what she has done. She can have no right, years after all this had been settled, to come into a court of chancery to charge that her own conduct has been a wrong and a fraud; that her own subordinate agents have misled her governor, and that her solemn act transferring these counties shall be set aside, against the will of the state of West Virginia, and without consulting the wishes of the people of those counties.

Three members of the court, Davis, Clifford and Field, JJ., dissented.

But this decision is only in some slight degree *analogous;* it is not in point. The question in dispute between Mr. Johnson and Mr. O'Conor is without precedent, and manifestly ought not to be suffered to turn on any analogy drawn from cases like the above. To our mind, the only substantial argument in favor of the doctrine that the President's recognition of Kellogg is conclusive upon himself, is to be found in the inconveniences which would result from his being declared a usurper. But it is believed that these inconveniences are more fanciful than real. If Kellogg is a usurper, not as much suffering would result from setting him aside now as would result from permitting him to continue his usurpation, and from his being declared an usurper by a subsequent rightful state government. But it is believed that in either event no substantial injustice could result, if the courts do their duty and decide according to law questions growing out of rights acquired under his government. For while he continues supported by the highest political power of the nation, he is the *de facto* governor, and his is the *de facto* government of the state. It follows that rights acquired on the faith of his government (except those acquired by the usurpers themselves, for they can acquire no rights by virtue of their own wrong) are as valid and meritorious as they would have been if acquired under the legitimate government. As the President's action in the premises concludes all persons until it is revised by Congress, so all persons are obliged to give the usurping government the same faith and credit as though it were the government *de jure.* Its bonds, and other obligations emitted under its authority, or under authority of acts passed by its legislature, are, except when in the hands of the usurpers themselves and those who have colluded with them, of the same validity as though it had been issued under the authority of a government *de jure;* and any court of justice which would countenance their repudiation, would not be deserving of the name. Assuming that the President's original decision in recognizing Kellogg was erroneous, and that he has become convinced of his error, the mischief of his not undoing it consists in the fact that important rights will be acquired on the faith of it, both in this country and in Europe, which may be overthrown by the intemperance of a subsequent state government.

Since the foregoing was written we have seen a letter of Mr. George Ticknor Curtis, in the New York Herald, for the 17th instant, in which he reaches the same result as Mr. O'Conor, though by a different process of reasoning.

—THE Virginia "oyster law," which we presume prohibits citizens of other states from taking oysters in the waters of Virginia, has been declared unconstitutional by Judge Bond of the federal circuit court.

Accommodation Indorsement by One Partner—Notice.

J. B. S. LEMOINE, ASSIGNEE IN BANKRUPTCY OF EARICKSON & BOYD, v. BANK OF NORTH AMERICA.

United States Circuit Court, Eastern District of Missouri, September Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **Accommodation Indorsement—Notice.**—If the maker of an indorsed note carries it to a bank for discount on his own account, this is notice to the bank that the indorsement thereon is an accommodation indorsement. Such is the presumption of law, if there is nothing in the transaction to repel it.

2. ——. ——. **Indorsement by Firm.**—If such indorsement be that of a firm, the bank discounting the note, under such circumstances, must, at its peril, ascertain whether there was any special authority, express or implied, for one partner to sign the partnership name as an accommodation indorser.

This is a contest between the Bank of North America and th assignee of Earickson and Boyd, bankrupts, respecting the liability of the firm on the indorsement of the name of the firm upon two promissory notes. A copy of one of the notes is as follows:

"ST. LOUIS, June 11, 1873.

"Sixty days after date we promise to pay to the order of Earickson and Boyd thirty-five hundred dollars, etc., at the Bank of North America, St. Louis, Mo.

"[Signed.] WHITE BROS.

"Indorsed: EARICKSON & BOYD."

The other note is for $2,500, dated June 17, 1873, at sixty days, with the same names as makers as the one above copied.

From the evidence before it, the district court found that the bank was entitled to have the amount of the two notes ($6,000 in all), allowed against the firm assets. The assignee appealed the case, and new pleadings were filed in the United States Circuit Court, as in action at law by the bank upon the indorsement. The facts in the case were found by the district court to be, that John K. Earickson and J. Will. Boyd formed a partnership on the 1st of January, 1873. By articles of copartnership both partners were prohibited from signing the firm name for the security or accommodation of third parties, and it was further stipulated that Earickson should have exclusive charge of the tobacco factory of the firm, and Boyd of the office and finances. The firm did not need any accommodation or borrow any money, except on drafts against their sales of tobacco, which they sometimes discounted at the bank. The Bank of North America had no knowledge of any of the above facts. The firm failed, owing about $60,000, of which amount only about $3,500 was legitimate indebtedness, the residue of the indebtedness having been created by Earickson, without Boyd's knowledge or consent, by using the firm name on commercial paper, for his, Earickson's, private benefit, or by indorsing for White Bros. The latter firm were also indorsers on accommodation paper drawn in the name of Earickson and Boyd, by Earickson, and the firm received no benefit therefrom. On the contrary, this was done without Boyd's knowledge or consent. The only instance to arouse Boyd's suspicions occurred in March, 1873, when he charged Earickson with using the firm name for private purposes. Earickson admitted the fact, but said it was only in one instance, and that he had the means to take up that paper. Boyd threatened to dissolve the firm if the act was repeated. Earickson took up that paper and Boyd knew of no other paper having been given, until after the failure of White Bros. Of these facts the bank had no knowledge. The notes upon which this claim is founded were made by White Bros., payable to the order of Earickson and Boyd, and indorsed with the firm names of Earickson and Boyd, but without the knowledge of Boyd. White handed the note to a director of the bank in the street; the director laid the note before the board of directors and it was discounted. The other note was handled in the same manner through a different director. The proceeds were placed to the credit of Earickson

and Boyd, and the money was drawn on their checks, signed in the handwriting of Earickson, which checks were drawn to the order of White Bros. and indorsed by them. The notes were protested, and Boyd was ignorant of all these transactions. It does not appear that the bank had any knowledge of the connection or relations of the two firms, except what appeared in the papers in question. The case was submitted to the court on the statement of facts substantially as above.

J. G. Chandler, for the assignee; *John R. Shepley*, for the bank.

DILLON, Circuit Judge.—On the facts found by the district court, upon which, by stipulation, the cause is submitted to this court, it is to be taken as true that the notes in the question were indorsed with the firm name of Earickson and Boyd, solely for the accommodation of White Bros., the makers, without any consideration to the endorsers therefor. It is to be taken as true that this indorsement of the firm name was made by Earickson without the consent of Boyd, and against the express stipulation on this subject in their articles of copartnership, and that the notes, when thus indorsed, were returned to the possession of the makers, from whom the bank received them, and at whose instance it discounted them, and who, through the checks of Earickson drawn in the firm name, received the proceeds of the transaction.

There is no finding or agreement that the indorsement of the firm name was made in accordance with any habit of dealing of the firm known to Boyd, or that there was, with Boyd's knowledge, such a course of dealing as respects accommodation indorsements in the firm name, as to justify an inference of Earickson's authority to bind the firm in this manner.

I concede, that in favor of third persons acting in good faith, it is a presumption of law that notes indorsed in the name of the firm were indorsed on the partnership account, and hence the indorsement on the notes in question will bind the firm unless it appear that the bank had notice that the indorsement was made outside the partnership affairs. Story on Notes, sec. 72; Byles on Bills, 47; Austin v. Vandermark, 4 Hill (N. Y.), 259–262: per Nelson, C. J. But inasmuch as the settled rule of law is, that it is not within the general scope of one partner to bind the firm by contract of suretyship, or to issue accommodation paper in the name of the firm for third persons, if the bank had notice that this was an accommodation indorsement, the burden of proof is upon it to show the assent of the other partners (either expressly, or from the firm's course of dealing in this respect), or their subsequent ratification. Byles on Bills, 47, and cases cited in the notes.

If, therefore, the bank discounted these notes without notice of the fact that the name of the firm had been indorsed upon them by one of the partners without the consent of the other, and for the accommodation of the makers, it is entitled to hold the firm upon the indorsement, although, in point of fact, it was placed there by one of the partners in fraud of the rights of his copartner, or without authority from him.

And the question on which the case turns is, whether the bank had such notice, for it is not attempted to show that Earickson had authority from Boyd, express or implied, to make the indorsement.

The bank is sought to be affected with such notice, by virtue of the fact that, after the notes bore the indorsement of the firm, they were in the hands of the makers, who met one of the directors of the bank when on his way to a meeting of the board of directors, and giving him the notes, asked him to have them discounted for the makers. It does not appear that the director informed the board of whom he had received the notes; but this is not material, for the learned counsel for the bank conceded in the argument that he supposed the law to be that the board or the bank would be chargeable with the knowledge of the director thus obtained.

Thus viewed, the real question in the case is reduced to this: Does the fact that the maker is in possession of a note before maturity, indorsed by another, affect the bank that receives it from the maker and discounts for him, with notice that it was indorsed for the maker's accommodation?

At the bar, counsel stated that they had been unable to find any adjudged cases upon the exact point, and they argued it on general principles. In view of the nature of the notice required to defeat the rights of the holder for value of commercial paper, as settled by the Supreme Court of the United States in Goodman v. Simmonds (20 How. 343), I was at first impressed in favor of the bank; but subsequent reflection has brought me to an opposite conclusion. To make accommodation paper is so entirely extra the business of a copartnership and the legitimate authority of a partner, that the presumption is properly against the power of one partner thus to bind his copartner. Therefore, when a bank has knowledge that an indorsement of the name of a firm is an accommodation indorsement, it is bound, at its peril, to ascertain whether the members of the firm, on whom it intends to rely, assented to the use of their name. This it can easily do. While on the other hand, if the bank were entitled to presume that the other members of the firm assented, the presumption would, in many instances, as in the case before us, be contrary to the fact and highly disastrous to innocent partners, who would be without the means of guarding against the fraudulent use of the copartnership name in unauthorized transactions.

If the facts of the case, as found by the district court, be considered, there can be little doubt that the bank knew the discount was for the benefit of White Bros., and consequently that the endorsement of Earickson and Boyd was presumptively, as it was in fact, for the accommodation of the makers.

On examination I find several cases distinctly asserting this to be the law, and I have not met with any holding a different view.

When a note not due is taken by the makers to a bank for discount for their account, with an indorsement thereon, the presumption, unless there is something in the transaction to repel it, is, that the indorsers are sureties for the makers, and that they did indorse it in the ordinary course of business. Upon this subject, Mr. Chancellor Walworth, in Stall v. Catskill Bank, 18 Wend. 478, holds this language: "If, therefore, it appears from the face of the paper that the partnership name is signed as surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of partnership business. He must, therefore, at his peril make the necessary enquiries and ascertain that there is some special authority for one partner to sign the partnership name as such surety, express or implied. So, if the drawer of a note carries it to the bank to get it discounted on his own account, or transfers it to a third person, with the name of the firm endorsed thereon, the transaction on its face shows that it is a mere accommodation endorsement, or the note would not be in the hands of the endorser, and the bank or person who thus receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm, who have been made sureties without their consent, are not liable to such holder of the note."

This language was quoted and approved by Mr. Chief Justice Sawyer in giving the judgment of the Supreme Court of California in Hendrie v. Berkowitz, 37 Cal. 113, 1869, and in which the court distinctly held, in a case precisely like the one now before the court, that the presumption was that the indorsement was an accommodation indorsement, and that the burden of proving the consent of the member who did not write the indorsement, is upon the holder. So, in Overton v. Hardin, 6 Coldw. 375, 1869, the Supreme Court of Tennessee said: "There can be no doubt that the possession of an indorsed note by the maker is presumptive evidence that it was indorsed for his accommodation." Edwards on Bills, 103, 105; Brown v. Taber, 5 Wend. 566; Erwin v. Shaffer, 9, Ohio St. 43.

In this last case, Brinckerhoff, J., says: "That although an indorsed note in the hands of the maker, after due, is presumed to have performed its office, and to have been paid off and taken up by the maker, yet no such presumption arises in the case of such a note before due; but that, on the contrary, in such case it is a matter of legal presumption that the note is unsatisfied, and is indorsed and placed in the hands of the maker for his accommodation. Wallace v. The Branch Bank, 1 Ala., 565; Mauldin v. Branch Bank, 2 Ala., 502; Stall v. Catskill Bank, 18 Wend. 478." See also language of Mr. Justice Nelson, in Bank of Rochester v. Bowen, 7 Wend, 159; Byles on Bills, 47 and note.

The amount of the notes, less the discount, was, in accordance with a usage of the bank, placed to the credit of the last indorsers —in this case Earickson & Boyd—and was drawn out on the two checks of Earickson & Boyd, signed by Earickson without the knowledge of Boyd, in favor of White Brothers. One of these checks showed on its face that it was for the proceeds of the note discounted, and amount of both showed that it was for the note transactions. It is insisted that this makes the indorsement binding on both. This view rests upon the ground of ratification by Boyd; but the essential element of knowledge on his part, both of the fact of the indorsement and of the check being drawn, is wanting. The checks do not, therefore, change the rights of Boyd, or make binding upon him his partner's act in indorsing the firm's name to the note in question. The district court erred in holding that the two notes were a claim upon the firm assets. The indorsement is alone binding upon Earickson.

JUDGMENT ACCORDINGLY.

Bankruptcy—Composition with Creditors.

I. *In re* HASKELL.

United States District Court for the District of Massachusetts.

Hon. JOHN LOWELL, District Judge.

1. **Bankruptcy—Composition.**—Under the amended bankrupt act, the mere fact that the bankrupt, if opposed, would be unable to obtain his discharge in bankruptcy, will not necessarily prevent the court from allowing a resolution of composition.

The creditors need not be informed beforehand of the exact proposition to be submitted by the bankrupt at a meeting called to consider a composition.

The schedules filed in the bankruptcy case are ordinarily a sufficient statement of the bankrupt's assets and liabilities.

LOWELL, J.—Several objections are taken to the acceptance of the resolutions of creditors to accept a composition of twenty-five cents on the dollar.

Section seventeenth of the amended bankrupt act introduces a new feature into the system, by enabling a certain amount and proportion of the creditors to accept a composition which shall be binding on all the rest. Full power is given to the supreme court to make rules, but until the next session of that court, the law, being in full operation, must be worked out as well as may be. Three points have been argued:

1. That there should be a written proposition from the bankrupt, preceding the notice to creditors, to lay the foundation for their action, and to inform them what they were to be asked to accept.

There is much force in this objection, abstractly considered, and it may be that the rules will prescribe something on the subject, but the statute does not, I think, require it. The course of proceeding pointed out by the law seems to be for the creditors to meet and discuss, the debtor being present and answering all questions, and then they may not only accept or reject a proposition which was made and filed ten days before, but the debtor may make and they may accept quite a different proposition from that which he came prepared to offer.

The creditors are to be notified of the time, place and purpose of the meeting, but not necessarily of the precise proposition to be made; unless the matter should be carefully regulated, there might be danger of introducing too much precision, by requiring that there should be a written point of departure for these proceedings. We have taken this section from the English act of 1869, 32 and 33 Vic. chapter 71, section 126. Under that act, very many and careful rules have been made and forms have been prescribed. Nos. 106 to 108.

These forms do not contain, either in the application by the debtor or in the notice to his creditors, any intimation of what the proposition is likely to be. This shows that the judges construe that section in the way I have suggested: there seems to be no reason to say that the debtor must have made up his own mind what he will offer before he meets his creditors. He may be investigating his affairs and may need their advice and assistance.

2. A somewhat similar course of reasoning applies to the second objection, which is, that the statement of assets produced at the meeting was insufficient. This was the schedule of assets already filed in bankruptcy. There is nothing in the mere words of the statute to require any other or different statement than is required in bankruptcy, and the most obvious course would be to make it as much like that schedule as might be, which is the rule prescribed by the court in England.

It is true that such a schedule cannot inform creditors of such particulars as will enable them to decide understandingly upon an offer of composition. But what written statement will do this? The law requires the debtor to be present and to answer all enquiries, and the creditors are not bound to act until all such enquiries have been answered, including those by a majority or by a single creditor, and including a due inspection and explanation of the books.

All this had been done some weeks before by a committee of creditors who had reported to the others; so that there was no real lack of information in this case, and I do not think I could lay down any better general rule for the written statement, than that in cases in which the sworn schedules have already been filed, they shall be used.

To consider the third objection in all its possible bearings, would be tedious. The objecting creditor offered evidence which he insists proves that a preference to a considerable amount was made to one creditor in June, after the debtor was insolvent.

It is said that this fact would prevent the debtor's discharge, and therefore ought to prevent the acceptance of the resolution which, if recorded, is intended to work a discharge.

As I said at the hearing, I do not believe the statute intends that no debtor can compound with his creditors under this section, who would not be able to obtain his discharge.

The law seems to leave it very much to the requisite number and amount of creditors, who, if all the facts are before them, may decide the whole matter. This thing had been known for weeks to all the creditors, and had been the subject of a report by a committee. The court has a discretion to accept or reject, as may be for "the best interests of all concerned." This means the best interests at the time being, all things considered.

In passing upon the acceptance of the resolution, I think the court ought to take into view all the circumstances, including, perhaps, the probability of a discharge in bankruptcy, and certainly the conduct of the several parties in its bearing on the composition. I have found nothing in this case which requires me to reject this resolution.

RESOLUTION TO BE RECORDED.

II. *In re* WALD & AEHLE.

United States District Court, Western District of Missouri.

Hon. ARNOLD KREKEL, District Judge.

1. **Bankruptcy—Composition—Number of Creditors.**—In estimating the number of creditors who are to be counted in passing a resolution in favor of a composition with the bankrupt, and also the number of names which are to be attached to the confirmatory statement, creditors whose debts are less than fifty dollars are to be excluded.

KREKEL, J.—Under the 43d section of the amended bankrupt act of June 22d, 1874, providing for composition with creditors, the court made an order directing a meeting of creditors to be held to act upon a composition proposed by the bankrupts.

The meeting was held, and the resolution passed, as well as the confirmatory signatures of creditors, are now before the court for its action. From the number of creditors who were present and represented at the meeting which passed the resolution, as well as the number signing the confirmatory statement, it becomes necessary to determine what is meant by language employed in the following part of the section referred to:

"And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, either in person or in proxy, and shall be confirmed by the signature thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor.

"And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars, shall be reckoned in the majority in value, but not in the majority in number." The question is, what creditors shall be counted in order to ascertain the majority spoken of, and are creditors, whose claims do not exceed fifty dollars to be disregarded in computing the majority who must pass the resolution, as well as in ascertaining the number of those who are required to sign the confirmatory statement. The court holds that all creditors whose claims do not exceed fifty dollars must be disregarded in arriving at the majorities required in both cases, that is to say, in passing the resolution there must be a majority of the creditors assembled at such meeting, either in person or by proxy, excluding all whose claims do not exceed fifty dollars, to make the resolution operative, and in the confirmatory statement the number of signers required, must be two-thirds, after excluding from the whole number of creditors all whose claims do not exceed fifty dollars. It may be admitted that this construction will, in some cases, cause hardships, as it increases the trouble or difficulty on the part of bankrupts to obtain the requisite number. It must be remembered, however, that the whole of the requirements of the bankrupt act in some sense may be called a forced proceeding, so far as the creditor is concerned; for the failing circumstances of the debtor largely interfered with his freedom of action.

A creditor may, under compulsion, as it were, attend the meeting of creditors provided for, but suppose he does not on account of the expense he must incur, which, though small, may be large when compared with the amount offered in composition, or he fails from any other cause to attend, the law should not, on that account, be construed against him, and favorable to the debtor who makes the offer. Throughout the whole section from which the quotation is made, greater regard is had to amounts than number. To illustrate; in providing for the taking of bankrupt estate out of the hands of the courts, and placing them in the hands of trustees selected by the creditors, *amounts* are exclusively regarded by providing that three-fourths in value of the creditors whose claims shall have been proven, shall pass the resolution.

The bankrupts will be required to bring themselves within the views of the court here expressed, in order to have their cases passed upon favorably.

[Correspondence.]

A Point in the Law of Homesteads—Partition.

OFFICE OF THE STATE REPORTER,
ANDOVER, N. H., October 9, 1874.

EDITORS CENTRAL LAW JOURNAL:—I learn that one of your corps is preparing a monograph upon that marvel of intricacy, the law of homesteads. I herewith enclose you the head-notes in Barney v. Leeds, one of the latest contributions on that subject. It is the same case reported in 51 N. H. 281. It was decided at the August term, 1874, Foster, J., delivering the opinion. These head-notes were prepared by him, at my request. The statute refered to in the last head-note, is as follows:

"When any estate is so situated that it cannot be divided so as to give to each owner his equal share therein without great prejudice or inconvenience, the same or part thereof may be assigned to one of the owners, he paying to the other persons interested, who shall have less than their shares, such sums of money as the committee shall award, or giving bond, with sufficient sureties, to pay the same, with interest, within such time as the court shall order."

The significance of the opinion arises from the fact, that the court is understood to have denied, in substance, though not in form, the power of the legislature to authorize a court of law to compel one person to buy another's land, for which he never contracted, which he does not want, and for which he has not the money to pay.

Apropos of your article on "Juries," our last legislature practically abolished trial by jury, in civil causes, by making it the duty of the court to send them all to referees, unless satisfied by some party that such a course would be inexpedient. I will endeavor to send you in a future note, the result of this experiment so far as developed. Very truly yours,

JOHN M. SHIRLEY.

BARNEY V. LEEDS.

The appraisal of a committee, setting off a dedtor's homestead, upon the levy of an execution, is conclusive upon the question of its value, until invalidated by some proceeding brought for the purpose of vacating or revising the record thereof. It cannot be called in question upon a subsequent proceeding for partition between the debtor and his creditor, to whom the residue of the estate has been assigned.

Whenever the estate of tenants in common is practically incapable of division, by assigning to each owner thereof, his equal portion in severalty, he cannot be compelled, under the provisions of § 25, Ch. 228, Gen. Stats., either to sell his own share, or purchase that of his co-tenant; but in such a case resort may be had to a court of equity, which has power to compel a sale of the entire estate, and a distribution of its proceeds upon equitable principles.

[Correspondence.]

Jury Service in the South—A New Plan for Getting Good Juries.

OXFORD, MISS., October 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—I have read with interest an article on the jury system, in a recent number of your journal (*ante*, p. 487). It is manifest to all who have considered the subject, that some reformation on this subject is necessary in most of the states, and especially in this state, where, under a law of the state, which has been in force for many years, the petit juries are drawn from a box containing the names of all males who are householders, between the ages of twenty-one and sixty, irrespective of their intellectual or moral qualifications. The system was bad enough before the addition of the newly enfranchised class, but few of whom, comparatively, have had such opportunities as are necessary to qualify a man for this important service.

The act of Congress requires that jurors in the United States courts, shall have the same qualifications, and be selected in the same mode required by the laws of the state in which the court is held, for juries in the courts of the state, *as far as practicable*, leaving it to the court or judge to determine the practicability of the state law. If the names in the jury boxes were such as desired, the United States authorities would have no right to go into them; to avoid this, the practice was for many years to make an order directing the marshal to summon from certain designated counties the required number, who were qualified jurors under the laws of the state. To those selected by the marshals themselves, no just objection could be made; but as the law allows as good as no compensation for the service, it was natural (and I do not know that they could much be blamed for it) for the marshal to adopt the most inexpensive mode of getting jurors, which has generally been by sending a special deputation to the sheriffs of the counties, assuming that the sheriffs knew the proper persons to summon. But the sheriffs, who are generally looking to a re-election, desire to please all parties, and, feeling no special interest in the court, excuse intelligent business men when requested, and often select those who request it, and who have no other business, and who are poorly qualified for this service. Besides this evil, it subjects the marshal to the reproach of partiality in his selections, to favor particular interests.

This system did not conform either to the form or spirit of the state law. To avoid these objections and to conform to the spirit of the state law in selecting the juries by ballot, and at the same time to procure such as were in every way qualified, I have in the courts in which I am the sole judge, and

Judge Woods, the circuit judge, and myself, have in the circuit court, adopted the following rules: The commissioners of the court in their respective localities select some three hundred names of gentlemen of well known intelligence, integrity, impartiality and fair mindedness, irrespective of race, or party affiliations. These names are forwarded to the clerk without any knowledge being given as to who they are, and are placed on slips of paper or ballots and placed in a box, which is kept locked except when the drawing is had, which is done by the marshal and clerk in the presence of the judge or a commissioner specially appointed to superintend it. The names drawn constitute the venire, and are summoned by the marshal or his deputy; both grand and petit juries are drawn in the same way.

The experiment has proved a success. The jurors obtained under it would do credit to any court. It relieves the marshal from any blame, avoids any possibility of a packed jury for any party; since in the first place the names in this jury box are unknown to any one but the commissioner and clerk, until drawn, and if they were known, it would not be known whose name would be drawn. The drawing is continued until the names are exhausted, when the box is refilled. The attorney-general has recommended to Congress to adopt a similar rule for all the United States courts, which I am satisfied is the best rule that can be adopted. Some of the states, I learn, have something like the same plan. Some plan should be adopted by which to secure the very best men for this important service.

I submit our rule for your consideration, and for any use you may see proper to make of it. Yours, etc., R. A. HILL.

Notes and Queries.

I. JUDGMENTS OF JUSTICES OF THE PEACE.

BLOOMINGTON, ILL., Oct. 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. instituted a suit before a justice of the peace, against B. A trial was had, the jury returning a verdict in the following form:

"We, the jury, fine for the plaintiff fifteen dollars and costs."

No further proceedings were had before the magistrate, and the magistrate failed to render a judgment on the verdict. From this verdict the defendant appealed the cause to the circuit court.

Would a motion to dismiss the appeal, on the ground that the justice rendered no judgment from which the defendant was authorized by law to appeal, be sustained? Would like a reply, with authorities, through the columns of the JOURNAL. C. D. M.

ANSWER.—We find that the precise case to which the above query has reference, has recently been adjudicated by Tipton, J., of the Circuit Court of McLean County, Illinois, in Merrit v. Tarman, 1 Monthly Western Jurist, 264, the learned judge declining to dismiss the appeal. In support of his position he cites the following cases: Lynch v. Kelly, 41 Cal. 232; Tilton v. Mullin-r, 2 Johns. 181; Gaines v. Betts, 2 Douglass (Mich.) 99; Iverall v. Pero, 7 Mich. 316. With this view, we entirely agree. As was said by the court in Gaines v. Betts, *supra*, "the verdict is itself the judgment of the law in the case, and the justice is simply required to make the entry on his docket. If he neglects to do so, still the verdict must be considered the final determination of the cause." We agree with the reasoning of Judge Tipton: "The failure of the justice of the peace to formally enter the judgment on the verdict, amounted simply to an irregularity that might be waived; and the defendant having regarded the same as a valid judgment and appealed from the same, thereby waived any right to complain on his part." The question may, however, be controlled in eaeh state by local statutes.

II. STATUTE OF FRAUDS—ANOTHER ANSWER TO W. F. (ANTE, P. 482).

We thank S. W. W. for the following, and are sorry that want of space has compelled us to delay it so long:

LITTLE ROCK, ARK., Sept. 30, 1874.

EDITORS CENTRAL LAW JOURNAL:—A correspondent presents to you the following question, which you request your readers to answer, to wit: "A is renting a store by the month from C., at $40 per month. B. offers him $200 to move out and give him possession; A. accepts the offer with the proviso that he be allowed to remain until he can get another house; in two week's time he moves out and tenders the key to B., which B. refuses to accept. The contract was not in writing. Was it within the statute of frauds? Is it an interest in land?" Will you allow me to dash off a few thoughts on the subject.

First, presuming that it is very doubtful about its being an interest in real estate, but whether it be or not, if there was no part payment, delivery or earnest given to bind the bargain, the case falls within another section of the statute of frauds, as the contract price exceeds the sum which requires payment, delivery or earnest in sales of personal property. And lastly, if the cosideration for the promise was neither real nor personal, then it was nothing, and the contract was *nude pact*.

But to the law as applied to this case. The case is a little obscurely put, but if I understand it rightly, it presents a case either of a fixed term, one month, or a common law tenancy at will.

It is in either event an interest in real estate, as now construed by the courts. Let us see what the law applicable to it is, viewed as a fixed term.

Uunder the statute of frauds, 29 Chas. II. C. 3, Sec. 4, which has been adopted in most of the states, a written agreement signed by the parties or his agent is generally necessary to the validity of any contract for the sale or purchase of lands, tenements or hereditaments, or any estate or *interest* in or concerning them, whether such estate or interest be subsisting or be proposed to be created *de novo*. Dart on Vendor and Purchaser, Chap. 2, p. 91; Sug. 135; Atty-Gen. v. Day, 1 Vesey, Sr. 218, and 12 Vesey Jun. 472; *ex parte* Cutts, 3 Deacon, 267, by Lord Cottenham.

Although an actual demise by parol for any term not exceeding three years at a rent not less than two-thirds of the improved value, was valid under the second section of the statute of 29 Chas. II, an executory agreement for such a demise is void unless in writing; so, a parol agreement by a lessee, for an assignment of the residue of his term, being less than three years, is void, and cannot, it would seem, operate as an underlease. Sug. 95; Barret v. Rolph, 14 Mees. and W. 348; Dart on Vendors, p. 92. New York and most of the American states have adopted the English statute with some modifications. For instance, there it is applied not only to every estate and interest in lands, but to every trust or power concerning the same, and the exception in favor of leases is confined to leases for a term not exceeding one year. (Such is the limit in Arkansas). See Trear v. Hardenburgh, 5 Johns. Rep. 272; 7 Cowan Rep. 263.

By the English statute, a lease for three years might be made by parol, provided the rent reserved did not exceed two-thirds of the improved value of the property.

In most of the states the period for which a parol lease may be made is limited to one year. In the case stated by your question, it is either a bargain for the transfer of an unexpired term, with possible right of renewal, or it was the transfer of a tenancy at will, which the courts construed by judicial legislation to be from year to year—as to which more anon—or else it was nothing and the contract was void for want of consideration. If it involved the transfer of a term, being an interest in real estate, the case is on all fours with the case of Barrett v. Rolph, 14; Meeson v. Welsby, decided in the Exchequer Chamber of England in June 1845. See also the case of Mollett v. Brayne, 2 Campbell 103; Thomas v. Cook, 2 B. & Ald. 119; Graham v. Whichelo, 1 C. & M. 188, and Lyon v. Reed, 13 M. & W. 285. In the case of Barrett v. Rolpb, although the 2d section of the act of 29 Chas. II, made prarol cases for less than three years valid, yet as the 4th section of that act required the contract, which transferred any interest in real estate, to be in writing, and a leasehold being such interest, could not be transferred by parol, although an underlease might be so made, the court refused in that case to recognize this transfer as an underlease. I have been unable to find any English decision changing this ruling. If we follow it, it is inevitable that in all cases, where one party holding an interest in real estate attempts to transfer it, although that interest be one which, by the statute of frauds, may be created by parol, being for less than three years in England, or less than one year in those states where the limits are shortened, he must do so in writing, or the case falls within the statute, and is void.

There has been another question in those states, wherein the statute of 29 Chas. II has not been literally adopted: As to whether or not a tenancy at will, as construed by the courts, is such an interest in real estate as will bring it within that provision of the statute; for the English statute expressly prohibited the parol assignment of a lease in this language: "And that no lease or estate, either of freehold or term of years should be assigned, granted, or surrendered, unless in writing." See 4 Kent Commentaries, pages 95–6; see also, 7 Barb. (S. C.) Rep. 191. We think, however, in these states, which have left out the specific provision of the English statute as to assignment of lease, there can be no doubt but that such assignments come within this general provision regulating sales of real estate or *any interest therein*. The following American cases bear strongly upon this question: McDowell v. Delap, 2 A. K. Marshall, 33, which involved a lease. Possession is an interest in land within the meaning of the statute. Howard v. Easotn, 7 Johnson, 205; Hesseltine, v. Seavey, 4 Shep. 212

The sale of timber on land growing, with an agreement that the purchaser shall have a certain time within which to take it off, and right of entry therefor, is a sale of an interest in land. Olmstead v. Niles, 7 New Hamp. 523. Many cases conflict with this. An agreement for future conditional sale is within the statute. Folsom v. Great Falls Co., 9 New Hamp. 355. A right to enter upon the land of another to repair a dam and embankment necessary to the working of a mill originally erected with the consent of the owner of the soil, is an interest in land, within the statute. Cook v. Sterns, 11 Mass. 533. See also, Scott v. McFarland, 13 Mass. 309; Stone v. Crocker, 19 Pickering, 292. A parol contract, to make a lease, is void, even where the con-

sideration of the deed which conveyed the land was such parol promise made by the grantee, with the further promise to support the grantor for life. Townsend v. Townsend, 6 Met. (Mass.) 319. An agreement, concerning leasing real estate not to be performed within a year, is not within the statute of frauds. Janes v. Finney, 1 Root, 549. An agreement to surrender a lease is within the statute. Lammot v. Gist, 2 Har. & Gill, 433. Also see, on the subject of assignment of leases and prescription rights, etc., Schmitz v. Lauferty, 29 Ind. 400; Lester v. White's heirs, 44 Ill. 464; Hogsett v. Ellis, 17 Mich. 351; Greton v. Smith, 33 N. Y. 245. This citation of American authorities, which has been taken mostly from the United States Digests, gives a fair specimen of the drift of American decisions.

At the page above cited from 4 Kent. Comm. will be found a note which contains a list of all the states which have adopted the English statute, with those which, like New York, have modified it, and the nature and extent of the change in each; by the use of this note and examination of the authorities of the several states, it will be found that there is no diversity of opinion as to the fact that a leasehold interest or possessory right, is an interest in real estate, within the meaning of the statute, as adopted by all of them, and being such interest the assignment of it is not a lease for less than one year under New York's modification, or less than three under 29 Chas. II, but is the transfer of an interest in real estate within the meaning of the 4th section.

Let us now examine the case, viewing it as a common law tenancy at will.

Originally an estate at will was not bounded by limits with respect to time. 2 Bl. Com. Ch. 9, page 145, to the end; Littleton, p. 1 Ch. 8, and comments; Preston Estates, Ch. Will; Com. Dig. Estate, 258; 1 Inst. 57; Watkins on Conv. 1–9.

As such estates depended upon the will of both parties, the dissent of either determined the estate, and the conveyance by the tenant determined the will, and ended the estate. But latter judges beginning with Mansfield, who was a great innovator, have given something of a term to this class of tenants, and this kind of tenancy has, under the effect of judicial legislation become nearly extinct practically. In the case of Timmons v. Rowlinson, 3 I, Burrow, page, 1603, Lord Mansfield, said, "and as it is notorious that an infinite quantity of land is holden in this kingdom without lease, therefore, it is an extensive case and proper to be remedied. In the 4th George II, the provision was for those cases where the landlord gave the tenant notice to quit. This the 11th of George II, provides for the case of the tenant giving his landlord notice of his intention to quit, and not delivering up possession according to it."

These tenancies, so numerous in England, in Lord Mansfield's day were all in a technical sense estates at will. But says Chancellor Kent, "such estates are said to exist only notionally, and when no certain term is agreed on, they are construed to be *tenancies from year to year*, and each party is bound to give reasonable notice of an intention to terminate the estate." 4 Kent Com. 111, 112 (Margin). Although judicial decisions have construed technical tenancies at will as being from year to year, yet there are cases like Doe v. Wood, 14 Messon & Welsby, 682, wherein it is held that a simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year; but that is not the case now before me, as I understand it, although we are left in the dark, as to A's exact relations with his landlord.

Though the tenant of a house is equally under the protection of notice as the tenant of a farm, which requires six months, or at least reasonalble notice of the determination of the will, yet if lodgings be hired by the month, the time of notice must be proportionately reduced. 4 Kent Com. 114. While it is true that an actual tenant at will, if there be any such, has no assignable interest, though it is sufficient to admit of enlargment by release, yet these estates above indicated are constructive tenancies, from year to year, and may be assigned. 4 Kent, 114.

I therefore answer the question, that the case put to your correspondent is within the statute. On the other hand, if the possessory right, or tenancy at will, or whatever else it is, be not an interest in real estate, then it is nothing, and the contract is void for want of consideration; for it is certainly will not be contended that it is personal property. But if the thing sold be personal, no earnest to bind the bargain being given, and being over the value of thirty dollars, is it not still in the statute of frauds? S. W. W.

III. EXAMINATION OF BANKRUPTS—LEADING QUESTIONS.

SAVANNAH, GA., September 24, 1874.

EDITORS CENTRAL LAW JOURNAL:—An asignee brings suit to recover a certain sum of money for the bankrupt's estate, which suit involves a fraudulent settlement between the bankrupt and the defendant. The bankrupt's testimony being necessary on trial, and he having removed from the district in which the bankruptcy was committed, the assignee sues out interrogatories. Can the assignee put leading questions in such a case, treating the bankrupt not as an ordinary witness, but as one who is bound by the bankrupt act (section 26) to give any and all information which will enable the assignee to receive, demand and recover debts or property due to his trust estate? Or, does such a mode of eliciting testimony for the assignee in this case refer more to the rules of the common law or to examinations of a bankrupt before a register, under section 26 of the bankrupt law?

If the common law rule as to leading questions in interrogatories should be sustained in such a case, then could not the assignee still put such questions, on the ground that the bankrupt is to be considered an unwilling witness, having been a party to the fraud? GUION.

ANSWER.—In an action of this kind the general rules of evidence would apply, and leading questions would not be proper, unless in the discretion of the court. If it appeared that the bankrupt was a hostile witness, or if the fraud was a fraud in fact, leading questions would be allowed.

IV. HOMESTEAD EXEMPTIONS.

CORVALLIS, OREGON, Sept. 21, 1874.

EDITORS CENTRAL LAW JOURNAL:—By the act of Congress, commonly known as the "Homestead Law," approved May 20, 1862, 12 Stat. 392, it is provided: "No lands acquired under the provisions of this act, shall, in an any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor." Before the expiration of the five years from date of settlement, the party pays the minimum price as allowed by section 8 of said act, and acquires a right to the title.

1. Are said lands liable to be taken in satisfaction of debts contracted prior to the issuing of patent therefor?

2. Are lands thus obtained "acquired under the provisions of this act," within the meaning of the clause above quoted? Truly, S.

ANSWER.—In view of the settled rule of liberal construction of such exemptions for the benefit of the family, it is probable the court would answer the first question in the negative and the second in the affirmative. We know of no decision on the question.

Summary of our Exchanges.

The Legal Intelligencer, for October 9, contains a long, and we should judge, important opinion of Mr. Justice Strong, in the Circuit Court of the United States for the Western District of Pennsylvania, in the Locomotive Engine Safety Truck Co. v. The Pennsylvania Railroad Co., ruling the following points:

1. The patent of the Locomotive Engine Safety Truck Company is not invalid for want of novelty in the invention, for, when in combination with a locomotive engine, it is substantially a different truck from any other in use. This combination is a patentable invention.

2. The mere forbearance to apply for a patent during the progress of experiments, and until the party had perfected his invention and tested its value by actunl practice, affords no just ground for presuming an abandonment.

Also several interesting decisions of the Supreme Court of Pennsylvania, from which we take the following points:

Ernst v. Wagoner. Defective acknowledgment of a married woman's deed does not entitle her husband's creditor to recover the property from her purchaser.

Pusey, executor, v. Dusenberry. A special partner cannot be made liable as a general partner on account of some acts done after the dissolution of the partnership.

Miller & Reist v. Kreiter. The right of set-off dates from the time that defendant had notice. One defendant may set-off his individual claim against a joint claim against him and another.

Rodgers v. the Riddlesburg Coal and Iron Company. 1. The admission of copies of field notes of a person who was not even the deputy-surveyor, cannot be admitted. 2. An ancient paper is not only one of great age, but it must come from the proper authority to be admitted,

The Legal Gazette, for October 9, reports with full statement and argument of counsel the case of the Wenona, Supreme Court of the United States, opinion by Mr. Justice Clifford. In this case the steamer Wenona was condemned for a collision with a sailing vessel, the wheelsman, mate, captain and other witnesses on the sailing vessel swearing positively to courses, and distances and times immediately prior to the collision, and these showing that the steamer was in fault; while though there was strong evidence on the steamer's side to show that these courses, distances, and times could not have been truly stated by the witnesses in behalf of the sailing vessel, this evidence was inferential chiefly, consisting of conclusions or arguments drawn from other facts sworn to, as *ex gr.*, the lights which the steamer saw and the lights which she did not see on the sailing vessel, and the effect of giving credence to this infe ential or argumentative testimony being to convict, as of necessity, the witnesses for the sailing vessel of perjury.

Also Stevenson v, Williams, same court, opinion by Mr, Justice Field, with the following syllabus:

1. The act of Congress of March 2, 1867, under which a removal may be had of causes from a State to a Federal court, only authorizes a removal where an application is made before final judgment in the court of original jurisdiction, where the suit is brought, It does not authorize a removal after an appeal has been taken from such judgment of the court of original jurisdiction to the Supreme Court of the state

2. Where the judgment of a state court was annulled by the decree of a court of the same state, on the ground that the notes on which the judgment was rendered were given for a loan of confederate money, and that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the President forbidding commercial intercourse with the enemy, this court cannot review the ruling in these particulars. It conflicts with no part of the constitution, laws, or treaties of the United States, and presents no federal question.

It also publishes Locomotive Engine Safety Truck Co. v. Pennsylvania Railroad Co., *supra;* and also gives condensed notes of several other cases, which have been elsewhere published.

The Pacific Law Reporter, for October 6, publishes Swain v. Duane, Supreme Court of California, which was a suit by a creditor of the husband to subject property claimed by the wife as her separate estate. It also publishes an opinion of Mr. Justice Field in the Circuit Court of the United States, for the District of California, in Patterson v. Tatum, an important land case. It also publishes several other short opinions delivered in the Supereme Court of California. In one of these, People v. Frese, the court below instructed the jury as follows:

"You will also observe that the difference between murder and manslaughter is, there is no intention whatever either to kill or to do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection." "This, said the supreme court, is clearly erroneous. Whether the homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case, there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forebearance for the weakness of human nature, will disregard the actual intent and will reduce the offence to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder."

The American Law Review, for October, publishes valuable papers on The Law of Literature and Art in England and America; The Trial of William E. Udderzook; The Wisconsin Railroad Acts, and The Law of Adoption. The rest of its contents comprises a Digest of the English Law Reports for May, June and July, 1874; A Selected Digest of State Reports; Book Notices; List of Law Books published in England and America, since July, 1874; Summary of Events.

The Southern Law Review, for October, contains a long paper on Homicide, and the Defence of Insanity, by James Wyatt Oates, Esq., of Abbeville, Alabama; and another on Railroad Laws, or Legislative Control of Railroads, by S. S. Wallace, Esq., of Denver, Colorado. The remaining portion of its contents comprises a Digest of the English Law Reports; a Selected Digest of State-Reports; and several Recent Decisions, among which we notice Memphis Dry Dock Co. v. Waggoner, in which the Supreme Court of Tennessee decides that the proceeding by attachment against boats to enforce liens is not a proceeding *in rem*, nor an admiralty proceeding, and does not conflict with the jurisdiction of the federal courts in admiralty.

It also publishes Atkieson v. Murfree, recently decided by Mr. Chancellor Cooper, of the Nashville Chancery Court. This case will be read with interest by Tennessee practitioners, as it relates to the vexed question of "Opening the Biddings" after chancery sales, where an advance has been offered. It will be remembered that the July number of the Southern Law Review, contained a caustic and searching paper on this question, by E. S. Hammond, Esq., of Memphis, reviewing the recent decisions of the Supreme Court of Tennessee, in Click v. Burris, in which a rule is laid down that the biddings may be opened upon a mere increased bid, and that an advance of ten per cent. on the previous offer is sufficient for this purpose. This decision Chancellor Cooper had not heard of at the time he decided Atkieson v. Murfree. The learned chancellor takes the view that the biddings should be reopened in proper cases, and that it should be done in the present case, an advance of 18 per cent. having been offered. The following is the syllabus:

1. A sale of land, made by the master, is not complete and binding upon the purchaser until confirmation: Owen v. Owen, 5 Hum. 352; Graves v. Keaton, 3 Cold., 8; Wood v. Morgan, 4 Hum. 372; Jones v, Walkup, 5 Sneed, 135; Moore, *ex parte*, 3 Head, 171; Rogers v. Clark, 1 Sneed, 665; Armstrong v. McClure, 4 Heisk. 80.

2. And it is the duty of the court, while securing the rights of the successful litigants, to see that the property be sold for the best price that can be had: Childress v. Hurt, 2 Swan, 487; Johnson v. Quarles, 4 Cold. 615.

3. It is allowable, therefore, to open the biddings alone upon the offer of a higher price, if the advance be so considerable as to furnish a sufficient inducement, under all the circumstances, to a resale of the property: Coffin v. Corruth, 1 Cold. 194; Newland v. Gaines, 1 Heisk. 723; Aubrey v. Denny, 2 Moll, 508; 2 Dan. Ch. Pr. 1285.

4. The advance which ought to be deemed sufficient to require the biddings to be opened, must be left to depend in some measure on the circumstances of the given case. An advance of sixteen hundred dollars is clearly sufficient.

5. The better practice, upon opening the biddings, is to authorize tha master, upon notice in the usual way, to receive bids for a limited time, commencing with the advance offered, the bidders to be required to make payments, and give notes as of the date of the original sale, and otherwise to comply with the terms and requirements of that sale, and the highest bidder at the end of that time to be the purchaser.

The American Law Record, concludes in its October number, with what we judge to be a very learned paper by A. T. Whatley, B. A., entitled Historical Sketch of the Law of Piracy. It also contains what we should take to be a very thoughtful and valuable paper by Sheldon Amos, A. M., on Materials of the Science of Law. It also publishes the case of Taylor v. Bonte, Superior Court of Cincinnati, General Term—a case which appears to relate chiefly to questions of local practice. It publishes several other interesting decisions, but these we have either published or noticed as they have appeared in other publications.

The Insurance Law Journal, for September, publishes thirteen important decisions on the law of insurance, fire and life. We may find space to notice some of these hereafter.

The Monthly Western Jurist (Bloomington Ill,), for October, has a leader on Selection and Summoning of Grand Jurors. It also prints Nugent v. Supervisors of Putnam County (*ante*, p. 153), with a valuable note. It publishes Merritt v. Tarman, McLean County (Ill.) Circuit Court (Tipton, J.), holding that a verdict of a jury before a justice of the peace in this form: "We the jury find for the plaintiff, fifteen dollars and costs," constitutes a valid judgment without any further order of the magistrate.

It prints Lovenguth v. City of Bloomington, Supreme Court of Illinois (Craig, J.), with the following syllabus:

1. This was an action brought in the circuit court by Joseph Lovenguth, against the city of Bloomington, to recover damages for an injury received by a minor son, Emil, in passing over a sidewalk in the city.

2. It appears from the record, that Emil Lovenguth at the time of the accident was eighteen years of age, he was working in the shop of the C. & A. R. R. Co., and in passing from the shop to his boarding place, over a defective sidewalk, he stepped upon a loose board, fell and fractured a bone of his ankle. He was well acquainted with the sidewalk, and knew it was in a bad and unsafe condition; had he so desired he could have gone over another sidewalk to his boarding place, which was entirely safe and secure, and the distance no greater.

3. Upon the evidence submitted, it was a question of fact for the jury to determine whether the accident occurred from the negligence and the want of proper care on the part of plaintiff's son, or from the neglect of the city to keep in repair the sidewalk in question. The jury found by their verdict that the injury received grew out of the negligence and the want of proper care of the injured party.

4. The instructions given and refused, examined, and *held*, that a party has no right to knowingly expose himself to danger, and then recover damages for an injury which he might have averted by the use of reasonable precaution.

5. The city having furnished a safe and secure sidewalk over which the plaintiff's son might have passed affirming the case of Centralia v. Krouse.

6. To recover damages after the commencement of the suit, and for future damages, it must appear from the evidence that the injured party has not at the time recovered, and that the injury is permanent, and if not permanent, at what time a cure could reasonably be anticipated.

It also publishes, Schintz v. Ballard, Circuit Court of Outagamie County, Wisconsin, (Ellis, J.), with the following syllabus:

1. By the terms of the will, the appropriations to the institute are to be made only on the condition that $75,000 shall be contributed by the citizens of Appleton, and the same to be actually paid to the said institute, or secured, to

the satisfaction of its board of directors, and of the executor, within three years from the time of the testator's death, or from the time the executor may have $50,000 in readiness for the first endowment mentioned in the will. *Held*, that the proposed endowment is made to depend upon a condition that may never happen, and that until the contingency does occur, that there is no beneficiary legally capable of receiving the $75,000, nor any part thereof, and that without such a beneficiary, the trust is not *present* and *active*, two elements indispensably requsite to the validity of the trust.

2. That this will, if it could be construed as a conveyance of the real estate to the executor in trust, or as giving him a power of sale for the purpose of the intended trust, might, in view of the fact that it allows three years or more, within which the conditions may be fulfilled, create a perpetuity.

3. That by the terms of the statute of Wisconsin, the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuence of two lives in being at the creation of the estate.

4. That so much of the will as was intended for the benefit of the Appleton Collegiate Institute, or any other similar institute, etc., held null and void. And that the property intended to be conveyed to the institute, must go as the law directs in relation to the decent of the property of intestates.

5. That the personal property that shall remain after the payment of all debts and funeral expenses and expenses of administration, must be distributed as follows. One half to the defendant, Harriet S. Edwards, under the residuary claim of the will, and the other half, which is not legally disposed of by the will, to the heirs at law, one of whom is the said Harriet S. Edwards, under the statute of Wisconsin.

It republishes from a Pennsylvania Law Journal, the case of Northup v. The First National Bank of Scranton (Ward, Recorder), with the following head-notes. We desire to call attention to these, because they aptly illustrate a mode of constructing the head-notes of cases, which many American editors and reporters have fallen into. They have but one fault; they do not tell what the court decides. They do lay down several propositions of law which the court recognizes *arguendo*, and with these they sometimes mix points stated in the abstract, which the court may have actually decided; but they nowhere give the facts of the case, and the judgment of the court upon those facts. This the English reporters generally do; and this is one of the features in which their reports are greatly superior to ours:

1 A preliminary injunction should be granted only to prevent irreparable mischief.

2. Such mischief is that for which the law affords no adequate remedy; when such remedy exists an injunction should not be granted.

2. Such remedy is one that affords a full, speedy, complete, feasible and compensatory redress.

4. The bill should aver such mischief, or state facts from which it can be inferred. In this respect the bill is amendable.

5. The right to an injunction must be clearly established, not left in doubt.

6. When a preliminary injunction has been erroneously granted, it should be dissolved on motion.

7. United States bonds are commercial paper, pass by delivery, and subject to all its incidents.

8. A bona fide holder for value of commercial paper has an indefeasible title to it, though he receives it from one without title to it, and fraudulently in possession of it.

9. Such holder has a legal and equitable title to such paper, though it had been stolen from the owner and advertised.

10. When one takes commercial paper as a collateral security, for the payment of a debt contracted on the credit of such security, such debt is a valuable consideration.

11. A guardian has the exclusive right to the custody and management of his ward's estate, and a chancellor cannot restrain the guardian from the management of such estate, until proceedings to remove him are begun or contemplated.

12. The extension of time for payment of a debt, and leaving a pledge still in security for the payment, is not a new pledge for the payment of an antecedent debt.

The Monthly Western Jurist also contains a short but valuable article on Negligence in Crossing a Railroad Track; and another on Recognizances to Keep the Peace.

The Washington Law Reporter, for October 13, published a very interesting and well-reported decision of the Supreme Court of the District of Columbia, on Soap Factory Nuisances in Washington City. The title of the case is Bates v. District of Columbia. The syllabus is as follows:

1. The 26th section of the act of Congress, to provide for a government for the District of Columbia, designates a board of health, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; but it does not confer power upon said board of health to declare anything or any condition of things a nuisance, injurious to health, which was not a nuisance by the rules of the common law, or made such by some statute governing the district.

2. Where the defendant and his ancestors had prosecuted continuously the business of manufacturing soap and candles in the same place for a period of more than forty years, it was held it could not be removed unless the facts upon which the question of nuisance depended were tried by due process of law, consisting of indictment and trial by jury; and it was also held that the board of health had no authority to pass ordinances under which the defendant was prosecuted by information in the police court, for the purpose of recovering a fine or penalty, for maintaining the alleged nuisance.

3. Writ of certiorari is the appropriate remedy to review the proceedings of a subordinate tribunal which has proceeded or is proceeding to judgment without jurisdiction. In a case where the police court has no jurisdiction the writ may issue to review such proceedings, although the statute provides for an appeal where there is to be a re-trial of the case.

In the Irish Law Times, for October 3, we find a well-written leader on the British Revised Statutes. In the Irish Law Times Reports for the same date, there are several cases, which, though turning upon British statutes, may interest our readers. In Gogerty v. The Great Southern and Western Railway Co., Irish Common Pleas, the syllabus is as follows:

In an action against carriers for loss of the plaintiff's goods, upon an issue that the loss arose from the felonious acts of the defendants' servants, it is sufficient for the plaintiff, under the Carriers' Act, section 8, to prove facts which render it more probable that the felony was committed by a servant of the defendant's than by any one not in their employ. Vaughan v. London and North Western Railway Company, L. R. 9 Ex. 93, followed.

In Wallace v. The Dublin and Belfast Junction Railway Co., before the same court, it is held that:

Where goods exceeding £10 in value, and of the description specified in the 1st section of the Carriers' Act (1 W. 4, c. 68), are delivered to a common carrier, without declaring their nature and value, and paying an increased rate for carriage, as notified and required, the carrier is exempted by the statute from liability for delay in the carriage, caused by his having temporarily lost the goods. Compare Hearne v. London South Western Railway Co., 10 Ex. 793; Pianciani v. London South Western Railway Co., 18 C. B. 226.

Moore v. Midland Railway Co., same court, was an action for loss of, and injury to goods, booked at "through" rates, for conveyance by land and by sea. The railway company with whom the contract was made, pleaded conditions in the contract exempting them from liability—firstly, where the loss and injury occurred while shipping, during the voyage, or the landing; and secondly, where it occurred through the default of the master and crew of the vessel by which the goods had been conveyed during a part of the transit. Upon demurrer to the pleas,—*held*, that the conditions were null and void under the 7th section of the 17 & 18 Vict., c. 31, as limiting the liability of the defendants, for the default of them or their servants, no facts appearing on the pleadings to show that the conditions were "just and reasonable, within the concluding proviso of the section."

In McMullen v. Greene, same court, an agreement was entered into between the plaintiff and the defendant, that the plaintiff should enter the defendant's service, as "salesman," in the tea-trade, the plaintiff understanding that he was only to be employed as traveler. The plaintiff afterwards acted for some time in the capacity of traveler; but was ultimately required by the defendant to act in the wholesale warehouse of the defendant. In an action for breach of contract thereupon,—*held*, that evidence to explain the meaning of the word "salesman," in the written agreement, was admissible. Compare Shore v. Wilson, 9 Cl. & F. 567 (per Tindal, C. J.); Evans v. Pratt, 3 M. & G. 759; Clayton v. Gregson, 6 A. & E. 302; Smith v. Wilson, 3 B. & Ad, 728; Price v. Mouat, 11 C. B. N. S. 508.

The Irish Law Times also reprints, from the London Saturday Review, an article on Irish Juries, which convinces the reader upon indisputable evidence, that trial by jury is a mere farce in that kingdom. Wonder if it is any more a farce than it is in some of the United States? It also reprints from the English Law Times, a very interesting article on the Future of the Legal Profession.

Legal News and Notes.

—EFFORTS to secure the pardon of Udderzook have failed, and he will be hanged.

—THE new constitution of Arkansas has been adopted by about 75,000 majority, only three counties voting against it.

—ATTORNEY-GENERAL A. F. JUDD, of the Sandwich Islands, is travelling in the United States.

—A law has recently been promulgated in Germany, by which the holder of a railway ticket may stop at any point on his journey, for any period, the ticket remaining good till used.

—A CASE is now pending in the Supreme Court of the United States—Phillips v. Payne—to test the constitutionality of the retrocession by Congress of a portion of the District of Columbia to Virginia.

—PRINCIPAL examiner of the patent office, Mr. Moritz B. Philipp, of Ohio, has been appointed an examiner of interferences, and first assistant examiner Henry A. Seymour, has been promoted to principal examiner, to take effect November 1.

—A mortage has lately been recorded in the recorder's office, in Reading, Penn., given by the Philadelphia & Reading Coal and Iron Co., to the Philadelphia & Reading R. R. Co., for the sum of $30,000,000. It comprises 257 pages of printed matter, and occupies in the mortage book, 158 pages.

—TWO attorneys, Mr. Hirst and Mr. Ingersoll, have recently been before the District Court of Philadelphia, on a charge of contempt in procuring fraudulent bail for clients. Mr. Hirst was suspended from practice until the first of January next, when the court will cease to exist, and Mr. Ingersoll was stricken from the roll.

—IN the United States District Court, district of Massachusetts, on the 30th September, Ellen Bell, a soldier's widow, was convicted of drawing a pension after remarriage, making oath that she still remained the widow of the soldier, and was sentenced to imprisonment for three months. Were such convictions more extensively noticed by the press, its effect would greatly lessen the committal of such crimes.

—CHIEF JUSTICE MCKEAN, of Utah, in his recent charge to the grand jury, urged them to look carefully into the institution of polygamy and to bring some of the most influential polygamists to the bar of justice; to bear in mind that the doctrine of polygamy goes hand in hand with the murderous doctrine of blood attonement, and to look more particularly after the principals than the agents.—[*Albany Law Journal.*

—ONE of the proposed amendments to the constitution of New York disqualifies from voting any person who shall "receive, expect, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribnte, to another, to be paid or used, any money or other valuable thing, as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding such vote."

—PRESIDENT LERDO of Mexico, formerly chief justice of that republic, is, it is said, seeking re-election to the presidency. This, it is stated, may cause trouble, as at the last election he secured the support of the Diaz party by promising that he would not be a candidate for re-election. President Lerdo ought to retire now, while his laurels are fresh and green. His predecessor, a soldier, saved his country from foreign subjugation, but it was reserved for him, a lawyer, to inaugurate within its boundaries a season of prosperity and repose, such as it had not enjoyed since its independence.

MR. ALEXANDER MITCHELL, President of the Saint Paul Railroad, and and also a representative in Congress, has written a letter to Governor Taylor, of Wisconsin, that his company will obey the recent railroad law of that state, declared constitutional by the state supreme court, until it shall be passed upon by the national supreme court; but he states that the company will be obliged to reduce the quantity and quality of train service, in order to save itself from loss. It is reported that the state attorney-general has agreed with the counsel of the Northwestern company to unitedly ask the United States Supreme Court to set down the hearing of the appeal for December 10.

—THE Detroit Tribune, for October 8, prints a very full abstract of the able and elaborate argument of Hon. Charles L. May, on the homœpathic side of what is known as the University Case, being an application for a mandamus to compel the board of regents of the University of Michigan to establish a chair of homœpathy institution. Those who delight in the study of coustitutional law, and who take pleasure in the reading of solid and forcible legal argument, will not regret reading this. We have the pleasure to acknowledge receiving it, also, in pamphlet form. Mr. May was formerly Lieutenant Governor of Michigan, and is one of the ablest lawyers of that state.

—AN exchange says: "the Graphic prints an admirable cartoon illustrating the recent discussion between Reverdy Johnson and Charles O'Conor in the columns of the Herald. The two eminent jurists are represented splitting hairs, illustrating the lines—

They could distinguish and divide
A hair 'twixt south and southwest side.

The manner, features, and general appearance of Mr. O'Conor and Mr. Johnson are admirably preserved, and the whole cartoon is an admirable specimen of the art of this unique and successful journal." There is no splitting hairs about it. They differ on a point which is vital, and of such magnitude that none but the ignorant and vulgar can fail to understand it.

—THE resignation of Richard W. Busteed, United States District Judge for Alabama, recently tendered, has been accepted by the President. Among the bar of Alabama, so far as we know, he had the reputation of being a man thoroughly unscrupulous, but of great ability and unquestioned nerve, and withal so adroit in covering his tracks, that the difficulty in procuring sufficient evidence to make his impeachment probable, was very great. Although political feelings no doubt entered into this estimate somewhat, yet it will be remembered that the judiciary committee of the last house, by a vote of six to ten, voted to impeach both him and Judge Durell, and there is little doubt that had he remained on the bench, he would have been impeached at the coming session of Congress. Be this as it may, a man of his ability and address can make much more money in the practice of his profession, than he could honestly make as a federal district judge, especially since the last modification of the bankrupt law.

—POLICE COURT REPORTING.—It does not require a great knowledge of law to be a reporter—that is, a reporter of the decisions of a police court, but it requires a great deal of other knowledge to keep pace with the progress which has been made in that noble art within the last few years. Thus far the police court reporter of the Detroit Free Press, has distanced all his competitors. The following is his report of a recent maritime case:

"The officer said he found Frank Duffy, a lake sailor, rounded to in an alley. He ranged up under his lee rail, forged ahead, and boarded the prisoner at the bow, receiving a couple of kicks in the stomach as he was getting out a line to take the prisoner in tow. The prisoner said it wouldn't take him long to repair damages, and if let off he'd spread what canvas he had left and head for Buffalo. 'I think,' replied his honor, 'that you need to go into the dry-dock for a thorough overhauling. You need new topsails and repairs to the hull, and I notice that your deck-beams are badly sprung. There's your weather-eye all closed up, half of your reef-points gone, and there's three feet of whisky in the hold. You could probably hold three feet more, but you won't probably smell it for thirty days to come.' 'Then,' continued the prisoner, stretching out his arm, 'may you miss stays with breakers dead ahead!' It was an awful treat, and Bijah told him that as soon as the thirty days were out they'd arrest him on a charge of man slaughter, and send him where Concord grapes were $1 a pound every month in the year."

—THE following cost-bills are vouched for as authentic, and indicate that costs more to die than to live in New York City:

EXECUTING JAMES STEPHENS.

Building scaffold	$32 77
Sheriff's fee	25 00
Barber, shaving convict	24 00
Printing notices	4 25
Advertising certificate	7 80
Sundry expenses	30 00
Total	124 07

EXECUTING JEREMIAH O'BRIAN.

Building scaffold	$191 07
Sheriff's fee	250 00
Twenty-four deputies assisting	120 00
Two watchers	200 00
Summoning jury and witnesses	10 00
Certificate and two copies	25 00
Advertising same	9 25
Sundry expenses	135 00
Total	940 48

If this thing keeps on, the tax-payers of the Empire State will be obliged to abolish capital punishment in self-defence.

—JUDGE WILLIAM MCKINDREE BYRD.—The Selma (Ala.) Times of the 25th ult. reports the occurrence of the death of Judge William McK. Byrd, an eminent lawyer of that State. His death was caused the day previous by an accident on the Selma, Rome and Dalton Railroad. Judge Byrd was born in Perry county, Mississippi, on the 1st of December, 1819. He finished his education at Lagrange College, Franklin county, Alabama, where he graduated with distinction in 1838. Soon after he graduated he commenced the study of law with Judge Clayton, Holly Springs, Miss. Having completed his law studies and obtained license to practice, he soon afterward removed to Alabama, and in 1841 he opened a law office and pursued his profession in Linden, Marengo county, until some time in the year 1853, when he removed to Selma, where he still pursued his profession. At Selma he practised law with great diligence and success, until he was elected chancellor of the division in which he resided. In 1865 he was elected one of the judges of the Supreme Court of the State. His decisions while on the supreme court bench were distinguished for their learning and ability. He remained in that high office until 1868, when he was ejected from it by the military authorities of the United States, under the reconstruction acts.